Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:MCT:CLE:[redacted]:POSTU-151728-01
[redacted]

date: January 30, 2002

to: [redacted], Team Manager
[redacted], Team Coordinator

from: Associate Area Counsel (CC:LM:MCT:CLE:[redacted])

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subject: [redacted]
Proposed Form 907, FYE [redacted], [redacted] and [redacted] - Income Taxes

This is in response to your oral request for our evaluation of the taxpayer's request that the Internal Revenue Service enter into the proposed Form 907, Agreement to Extend the Time to Bring Suit (copy attached).

We recommend that the Internal Revenue Service not enter into the proposed Agreement to Extend the Time to Bring Suit.

Rather, we recommend giving the taxpayer a letter detailing why it is clear that the period for filing suit under I.R.C. § 6532(a) has not begun to run, and providing assurances that the United States will not argue that any of the identified items of correspondence operated to start the running of the statutory period of limitations to bring suit on the refund claims filed for the tax years ended [redacted], [redacted], [redacted], [redacted], and [redacted].

FACTS

On [redacted], [redacted], Inc. and Subsidiaries ("[redacted]") filed claims for refund relating to a short-term capital loss claimed to be created in the fiscal year ending May 3, [redacted] when [redacted] ("[redacted]") sold some [redacted] stock. The claims for refund were filed to carry-back the capital loss to the fiscal years ended [redacted], [redacted] ($[redacted]), [redacted], [redacted] ($[redacted]), and [redacted], [redacted] ($[redacted]).

On [redacted], claims for refund were filed to claim additional research credits for the fiscal years ended [redacted], [redacted] ($[redacted]), [redacted], [redacted] ($[redacted]), and [redacted], [redacted] ($[redacted]).

[redacted] has received three items of correspondence from the Internal Revenue Service relating to its refund claims:

1. [redacted].
2. "[redacted].
3. [redacted]

None of the above items of correspondence constituted, nor were intended to constitute, a statutory notice of disallowance, within the meaning of I.R.C. § 6532(a)(1), of the claims filed on [redacted] and [redacted].

No statutory notice of disallowance, within the meaning of I.R.C. § 6532(a)(1), has been issued as to the claim filed on either [redacted] or [redacted].

The refunds at issue in the claims are subject to review by the Joint Committee on Taxation. 26 U.S.C. § 6405(a).

IRM 4.3.5., Joint Committee Handbook, Chapter 3.2.9 provides as follows:

> (1) In an agreed claim case involving the disallowance in full or in part of a claim for refund or credit, the agent will not solicit Form 2297, Waiver of Statutory Notification of Claim Disallowance. This form should not be requested because of the additional time required to process a joint committee case. It prematurely starts the two-year period that the taxpayer has to file suit for the claim.
>
> (2) The examiner should indicate on Form 3198 (or other special handling form) that Form 2297 should be solicited or a statutory notice of claim disallowance should be issued after Joint Committee clearance.

IRM 4.4.7.10 (02-08-1999) dictates that, in all cases involving the disallowance of a claim for refund, in whole or in part, a notification letter will be issued to the taxpayer. The forms prescribed in the manual for use at the Examination level for certified statutory notices of disallowance are the Letter 905(DO)(Rev. 4-1999), if the claim is only disallowed in part, or

Letter 906(DO)(Rev. 6-2000), if the claim is disallowed in full.[1] (Copies attached). Both Letters 905 and 906 contain language that the letter serves as "legal notice" of claim disallowance, and instructs the taxpayer that the law permits the filing of a refund suit within two years from the mailing date of the letter (with the stated caveat that, if the taxpayer signed a waiver of Statutory Notification of Claim Disallowance, Form 2297, then the period for bringing suit began to run on the date that the taxpayer filed the waiver).

DISCUSSION

The general period of limitations for filing a refund suit is found at I.R.C. § 6532(a)(1), which provides as follows:

> **(a) Suits by taxpayers for refund.**
>
> **(1) General rule.** No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty or other sum, shall be begun
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> [i] before the expiration of 6 months from the date of filing the claim required under such section ***unless the Secretary renders a decision thereon within that time,***
>
> [ii] nor after the expiration of 2 years from the date of ***mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance*** of the part of the claim to which the suit or proceeding relates. (Emphasis added, including the insertion of the bracketed numbers [i] and [ii]).

The limitations regime established by section 6532(a)(1) is two-fold: it establishes a waiting period of six-months which prohibits a taxpayer from filing a suit too early; and a two-year limitations period which prohibits a taxpayer from filing a suit too late. The "too early" limitation will be referred to as the "six month rule" and the "too late" limitation will be referred to as the "two-year rule."

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[1] In addition to the form letters 905(DO) and 906(DO), computer generated notices of claim disallowance are prepared on letters 105C and 106C, IRM 21.5.3.4.6.1.1, and Appeals uses letters 1363 (RO) and 1364(RO) for their certified notices of claim disallowance, IRM 8.5.1.4.1. While the statute and the regulations do not prescribe any particular form for the notice of disallowance, other than that it be sent by certified or registered mail, the Internal Revenue Service, in its manual, has adopted certain prescribed forms for notices of claim disallowance.

It is clear that more than six months have passed since the taxpayer filed the claims, so the first restriction contained in section 6532(a)(1) is not relevant. The taxpayer is not concerned with the six month rule, but rather is only concerned with the two-year rule. We think that the taxpayer's concern is not well-founded.

A. The I.R.S. should not execute the proposed Form 907.

Although there has been no statutory notice of disallowance, which the taxpayer apparently concedes[2], and no waiver of the notice of disallowance can be filed because the Service is precluded from accepting said waiver[3], the taxpayer wants to enter into an agreement to "extend" the time to bring suit even though the time to bring suit has not even begun to run yet. The taxpayer proposes that the parties enter into an Agreement to Extend the Time to Bring Suit, Form 907, "extending" the statute to [redacted], [redacted][4], with an attached statement explaining why no date was supplied for the notice of disallowance mailing or the waiver filing as required by the Form 907.

At first glance, such an approach looks like it has merit and we agreed to evaluate whether the Service should enter into such an agreement in order to accommodate the taxpayer and alleviate its concerns regardless of how unfounded we believed those concerns might be. However, upon evaluation of the submitted Form 907 and further consideration of the issue, there are significant problems with the approach recommended by the taxpayer.

First, it is clear that the parties are attempting to extend a statute when both sides apparently agree that the statute has not even begun to run. I.R.C. § 6532(a)(1) dictates the period for limitations on bringing a suit for refund, and states when the period of limitations begins to run (i.e., when the notice of

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[2] The attachment to the proposed Form 907 states that the "taxpayer believes that none of [the three described items of correspondence] was intended to constitute, and that none did constitute, a 'notice of disallowance' of any of the Claims, within the meaning of section 6532(a)(1) of the Code."

[3] It is our understanding that this is a partially agreed claim case as to the claim filed in connection with the CHB issue. Accordingly, IRM 4.3.5.3.2.9 applies.

[4] Actually, there is ambiguity in the proposed Form 907 as to the extension date because the Form 907, on its face, extends the statute to [redacted], while the supporting statement requests that the statute be extended "to at least [redacted]."

disallowance is mailed). Although the parties, in fact, control when the statute begins to run by their actions (e.g., mailing by registered or certified mail a Form Letter 905(DO) statutory notice of claim disallowance will begin the running of the period), the parties can not dictate by their agreement alone when the statute begins to run. That is the role of Congress. In other words, while the parties can bring themselves within the terms of the statute and thus start the clock ticking, the parties cannot simply agree that the clock starts to tick now even though both sides agree that the steps necessary for the clock to start per the statute have not taken place. An agreement to "start the clock" is, in effect, what is implied if the parties enter into the proposed Form 907.

Second, if the proposed Form 907 is signed what it will **arguably** do is establish a deadline for bringing suit, a [redacted] or [redacted] deadline. This is exactly what the manual instructs the agents to avoid by dictating that Forms 2297 will not be accepted in a Joint Committee case. The only difference between entering into the proposed Form 907, and accepting a Form 2297 today, would be that the period for filing suit would **arguably** expire on either [redacted] or [redacted], rather than two years from the date that the Form 2297 was filed.

Finally, there is a possibility that, due to the ambiguity of the attached statement and the stated reasons for entering into the agreement, the proposed Form 907 would only mean that the period for bringing a refund suit would not expire prior to the "agreed" period, while the taxpayer would be free to argue for a later time if needed by arguing that the period only began to run once the I.R.S. finally does issue a statutory notice of disallowance. Moreover, if the Service "relied" on the outer limit contained in this extension, and never issued a statutory notice of disallowance, it is conceivable that 5, 6, or even 25 years down the road the taxpayer could file a refund suit on these claims - arguing that the period of limitations did not, in fact, begin to run because there was no statutory notice of disallowance. Detroit Trust. Co. v. United States, 130 F.Supp. 815; 55-1 USTC ¶ 9333 (Ct. Cls. 1955)(suit filed in 1953 timely because filed within 2 years of the issuance of the notice of disallowance, even though claim initially filed 1923); but see Finkelstein v. United States, 943 F.Supp. 425, 97-1 USTC ¶ 50,173 (USDC N.J. 1996)(in dicta, even if action would not have been barred by the two-year limitations period under section 6532(a)(1), it would have been barred under the general six-year limitations period for filing suit against the United States under 28 U.S.C. § 2401(a)). This potential problem, though extreme, is another reason to reject a proposal that does not fit squarely into the procedures mandated by the Code and adopted by the Service for handling and processing this type of case.

For the above stated reasons, we recommend that you decline to execute the Form 907 proposed by the taxpayer.

B. Alternative recommendation to alleviate taxpayer's concerns.

We recommend that this issue be discussed further with the taxpayer with the hope that the taxpayer can be convinced that there is no harm in relying on the fact that the two-year statute has not even begun to run. Additionally, the Internal Revenue Service can give the taxpayer written assurance that it will not argue that any of the identified items of correspondence operated to start the running of the statutory period of limitations to bring suit on the refund claims filed for the tax years ended [redacted], and [redacted].

It is the Service's position that the two-year statute of limitations for filing suit under section 6532(a)(1) does not begin to run until a notice of disallowance is sent by certified or registered mail and, until then, a Form 907 is not necessary. Rev. Rul. 56-381, 1956-2 CB 953. The plain language of the statute unambiguously requires the notice of disallowance be sent by registered or certified mail, and this is reinforced in the Treasury Regulations. 26 CFR § 301.6532-1(a). In Thomas v. United States, 166 F.3d 825 (6th Cir. 1999), it was held that a letter sent via regular mail did not constitute a proper notice of disallowance under section 6532(a)(1), and that the two-year period for filing suit only began to run when the I.R.S. sent a subsequent rejection letter by certified mail. There has been no notice of disallowance sent by certified or registered mail in this case, so the two-year period has not begun to run. Again, the taxpayer apparently concedes that this is correct.

However, the taxpayer argues that there is case law which causes concern that a court might find that correspondence already issued by the Service in regard to these claims constitute statutory notices of disallowance, and that suit would be time barred after [redacted]. We have reviewed the cited cases, and do not believe that the cases should be a cause of concern for the taxpayer.

The statement attached as part of the proposed Form 907 waiver identifies cases in which the courts have purportedly "ruled that various types of correspondence from the Service do or do not constitute notices of disallowance." Most of the cited cases do not stand for that assertion. The cited cases, for the most part, only address whether various items of correspondence from the Service, or actions by the Service, constituted *a decision rendered by the Secretary* for purposes of applying the six month rule, or the "too early" prohibition of the statute, not the two-year limitation in the statute. In other words, most of the cited cases

address whether an item reflects a "decision" of the Secretary for determining whether a suit, ostensibly filed during the mandatory six-month waiting period, was nevertheless permitted since there had been an adverse decision of the Secretary. Register Publishing Company v. United States, 189 F.Supp 626 (D. Conn. 1960)(30-day letter is to be construed as a "decision" of the Secretary, suit within 6 months of claim filing permissible); Stephens v. United States, 63-2 U.S.T.C. ¶ 12,163 (E.D. Ark. 1963)(30-day letter is an administrative "decision" adverse to plaintiff's claim thus suit filed within six months was not premature); Hicks v. United States, 64-2 U.S.T.C. ¶ 12,249 (E.D. Mo. 1964)(suit filed within 6 months of claim permitted because letter and first page of revenue agent's report constituted "decision" of the Secretary); W & S Distributing, Inc. v. United States, 96-2 U.S.T.C. ¶ 50,491 (E.D. Mich. 1996)(oral statement by Special Procedures representative that the claim had been denied constitutes a decision, suit filed within 6 months of claim filing permissible); Gervasio v. United States, 627 F.Supp. 428 (N.D. Ill. 1986)(I.R.S. refusal to accept a Form 843 claim for abatement constituted a decision of the Secretary so that suit filed within 6 months of the attempt to file the claim was permissible).

The proposed Form 907 contains one cited case which addresses whether certain correspondence constituted statutory notices of disallowance for purposes of applying the two-year rule. In Clement v. United States, 72-2 U.S.T.C. ¶ 9647 (D. Mass. 1971), the District Court gave the taxpayer broad latitude in construing the taxpayer's "intrinsic 1964 tax return" as being "at least an implied § 7422(a) claim for refund" of $22,406.05. After giving the taxpayer such broad latitude in construing the claim, the District Court explicitly stated that it would treat the government with equal latitude in finding that it would treat a 30-day letter as a notice of disallowance - at least as to a portion of the claim ($20,875.86), and an allowance of another portion of the claim ($1,547.61). The District Court then went on to direct the taxpayer to file a motion for summary judgment as to the $1,547.61. It is clear that the District Court made such findings of fact in order to maintain jurisdiction over the case and to allow the taxpayer the refund the Service had determined. Basically, this reported case explicitly stretched the rules and is not applicable to the facts in this case or any other case.

The proposed Form 907 also contains a cite to In W.J. Jones & Son, Inc. v. United States, 34 A.F.T.R.2d 74-5632 (S.D.N.Y. 1974). In W.J. Jones, the court addressed whether a letter from Regional Counsel constituted a notice of disallowance for purposes of applying the six-month notice of disallowance limitation found in section 6532(c) for wrongful levy suits. The statutory provisions regarding the requirement for a "notice of disallowance" are similar so this reference is relevant to the section 6532(a)(1) discussion. In W.J. Jones, it was found that a letter from the

Regional Counsel was not a notice of disallowance because it was not unequivocally a final determination. The court did not reach the arguments that it was not a notice of disallowance because it was not sent by registered or certified mail, nor was it signed by the Secretary or his delegate. While it is true that the argument was advanced, unsuccessfully, on behalf of the Service that a letter from counsel was a disallowance in defense of the wrongful levy action in W.J. Jones, this does not mean that the Service would, contrary to the position stated in Rev. Rul. 56-381, make an argument that the 30-day letter issued in this case constituted a notice of disallowance. In W.J. Jones, the court held, contrary to the position of the Government, that a letter to Regional Counsel constituted a request for the return of property under the Code; thus, the Government was forced to make the unsuccessful alternative argument that Regional Counsel's response constituted a notice of disallowance.

Further, if the Service provides the taxpayer with a letter unequivocally stating that none of the three identified items of correspondence constituted a notice of disallowance for the purpose of starting the 2 year statute of limitations under section 6532(a)(1), which letter the taxpayer would rely upon, it is inconceivable that either the United States would make the argument that the period ran from those dates, or that a court would hold, *sua sponte*, that there was no jurisdiction for a suit filed after [redacted]. Such a letter should be sufficient to alleviate the taxpayer's concerns.

After your discussions with the taxpayer, please notify this office if you need assistance composing a letter as suggested herein.

[redacted]
(Large and Mid-Size Business)

By: [redacted]
Senior Attorney (LMSB)